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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing
The Telephone Consumer Protection
Act of 1991

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CG Docket No. 02-278
CC Docket No. 92-90

To: The Commission

**COMMENTS OF THE CELLULAR TELECOMMUNICATIONS &
INTERNET ASSOCIATION**

The Cellular Telecommunications & Internet Association ("CTIA") submits these comments in response to one narrow issue in the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking² on the Implementation of the Telephone

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² *In the Matter of Implementation Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250 (released Sept. 18, 2002) ("*TCPA NPRM*").

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Consumer Protection Act of 1991 (“TCPA”):³ the impact of number portability on the TCPA’s prohibition on the use of any automatic telephone dialing system or an artificial or prerecorded voice to call a wireless phone.

The TCPA’s prohibition on the use of certain telemarketing tactics to contact wireless phones is absolute without regard to how difficult it may be for a telemarketer to distinguish between a wireless and wireline phone. The Commission does not have the authority to lighten this statutory burden.⁴ In any event, technology exists today, or will exist upon

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), (*codified as amended at* 47 U.S.C. § 227) (“TCPA”). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

⁴ The Commission has authority to implement the TCPA and in doing so

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent; and

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement.

Nothing in these statutory grants of authority would permit the Commission to do more than it has in exempting noncommercial calls, whether wireless or not, from regulation, and calls made where the called party does not pay.

implementation of the Commission's number portability regime, so that telemarketers will be able to identify phones whose numbers have been ported to a wireless device.

I. THE TCPA'S BAN ON TELEMARKETING TO WIRELESS DEVICES

A. The TCPA Absolutely Prohibits Autodialing and Artificial Messages to Wireless Devices Where the Called Party Pays

The TCPA specifically prohibits telephone calls using **an** autodialer or **an** artificial or prerecorded voice message to any telephone number assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party.⁵ While this simple statutory prohibition is self-executing, the Commission enacted rules to further define and emphasize the prohibition.⁶

Now, the Commissions seeks comment, among other things, on the effect of its number portability decision on telemarketers.⁷ Local number portability ("LNP") will enable wireless customers to "port" their telephone numbers in the event they switch from one wireless carrier to another, or from a wireline to a wireless carrier.⁸ The Commission asks: how will telemarketers identify wireless numbers in order to comply with the TCPA?⁹

⁵ 47 U.S.C. § 227(b)(1)(A)(iii).

⁶ 47 C.F.R. § 64.1200(a)(1)(iii).

⁷ TCPA NPRM ¶ 46.

⁸ The LNP deadline is November 24, 2003. *See In the Matter of Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number*

CTIA appreciates the Commission's concern to ensure that its LNP regulatory action does not have the unintended consequence of wireless subscribers receiving *and paying for* unwanted autodialed telemarketing calls. However, the concern is somewhat misplaced in that the TCPA is a strict liability statute in regard to use of autodialers or artificial or prerecorded voice calls to a wireless phone. Whether or not it is hard or even technologically possible for a telemarketer to distinguish between a wireless and wireline phone is irrelevant. To decide otherwise would be to rewrite the statute by appending the words "*if possible*" to prohibition.

Congress, of course, intended no such outcome, but rather recognized that it was unfair for a wireless subscriber who pays for airtime and service to bear the cost of unwanted telemarketing calls.¹⁰ This is true whether or not the wireless customer purchases a "bucket" of minutes or pays for airtime and service by the minute." Accordingly, the Commission should affirm the complete prohibition on telemarketing by means of any autodialer or

Portability Obligation and Telephone Number Portability, WT Docket No. 01-184 and CC Docket No. 95-116 FCC 02-215 (released July 26, 2002).

⁹ TCPA NPRM, ¶ 46.

¹⁰ See H.R. Rep. No. 102-317, 102nd Cong. 1st Sess. (1991).

¹¹ TCPA NPRM, ¶ 42-44. The Commission cites to the 2002 CMRS Competition Report and queries whether wireless customers that purchase large buckets of minutes might somehow be less offended by the depletion of their minutes by unwanted telemarketing calls. Whether the wireless customer pays by the call or pays for a bucket of minutes, the prohibition applies and telemarketers would never know in advance which rate plan the customer uses in any case.

prerecorded or artificial voice to any wireless device where the called party pays regardless of how difficult it may be to identify the device as wireless in the first instance.¹²

B. Alternative Technology is Available for Telemarketers to Identify and Avoid Calling Wireless Devices

The Commission sought comment on the extent to which telemarketing to wireless consumers exists today. CTIA is not aware of a definitive study, but the anecdotal evidence is convincing that, having built it, the telemarketers will come.¹³ One need only do a random search of the Internet for stories or laments about telemarketing to wireless phones such as this one to prove the point:

Regarding the sole use of wireless phones as an alternative to a land line connection, as I have done for nearly two years . . . Telemarketing agencies have regularly contacted me on my cell phone concerning everything from vacation homes to long-distance service.¹⁴

As further affirmation, the Direct Marketing Association (“DMA”) has created The Wireless Telephone Suppression Service to assist telemarketers in identifying those area codes and prefixes (the first three digits in a phone number following the area code) assigned to wireless carriers to avoid TCPA violations. The DMA file is comprised of 280 million

¹² The concerned telemarketer facing strict liability for contacting wireless devices with the advent of LNP has a realistic choice – do not call at all. The telemarketer may not transfer the to cost of the marketing campaign to the wireless subscriber.

¹³ Paraphrasing “If you build it, he will come.” William P. Kinsella, *Shoeless Joe passim* (Houghton Mifflin Company 1999) (1982) (basis for the movie Field of Dreams).

¹⁴ Pittsburg Post-Gazette, *Post Your Problems* (Nov. 13, 2001), available at <http://www.post-gazette.com/consumer/20011113zanosconsume2p1.asp>

phone numbers including all those numbers that are currently used or have been set aside for wireless numbers. The file is available for monthly downloads at an annual subscription price of \$500.¹⁵ Of course, LNP may diminish the usefulness of this service unless it is enhanced, but at present, there is no excuse for autodialing a wireless phone.¹⁶

When LNP takes hold, CTIA would support access to the Interactive Voice Response (“IVR”) system being developed to enable Public Safety Answering Points to identify whether a caller is making an emergency call from a wireless or wireline phone.¹⁷ While telemarketers currently do not have access to the IVR system, CTIA sees no compelling reason why the Number Portability Administration Center administrator, Neustar, should limit access to service providers, authorized law enforcement, and public safety agencies.¹⁸

The Commission may also be interested in reviewing the services offered by Intrado, Inc. Intrado has developed a national repository line level database, which it is offering to

¹⁵ The DMA Interactive, *Marketing Mistakes: Reaching Wireless Devices*, available at <http://www.the-dma.org/library/guidelines/wirelessmarketing.shtml>

¹⁶ The DMA initiative is to be lauded. It is one answer to the Commission’s question about whether and how telemarketers can distinguish between wireless and wireline phones. TCPA NPRM, ¶ 43.

¹⁷ TCPA NPRM, ¶ 46.

¹⁸ See generally, *Number Portability Administration Center*, available at <http://www.npac.com>. CTIA would expect that direct access or limited customization of the IVR output for telemarketing (i.e., indication only that the phone is wireless rather than the identity of the carrier) would be on a fee basis.

U.S. telecommunications carriers as line information database replacement.¹⁹ While ostensibly aimed at solving billing and customer care issues, there is an obvious application for telemarketing number verification to avoid calls to wireless devices.

Telemarketers should be required to query up-to-date databases on a per-call and pre-call basis to ensure that no wireless users are contacted in violation of the TCPA or the Commission's rules. CTIA supports "per-call, pre-call or no call" as the rule. There is no statutory basis for lessening the burden on telemarketers who use autodialers or artificial or recorded voice messages to wireless phones.

Finally, CTIA suggests that the Commission could require telemarketers to identify themselves through features like Caller ID any time they initiate a telephone solicitation. Telemarketers frequently block their Caller ID information when contacting consumers. The Commission's rules and the TCPA impose identification requirements on recorded or artificial voices.²⁰ Identifying the telemarketer's originating number and name will permit carriers and other service providers to develop call blocking techniques that empower customers to decide for themselves when to accept a call. Of course, this general principle does not trump the more specific prohibition in the TCPA against autodialing wireless phones in the first place.

¹⁹ See *Intrado Announces General Availability of its National Repository Line Level Database to U.S. Telecommunications Carriers* (Sept. 30, 2002), available at <http://www.intrado.com/main/home/news/press/093002pj>

²⁰ 47 U.S.C. § 227(d)(3)(A); 47 C.F.R. 64.1200(e)(2)(iv) (2002).

II. CONCLUSION

The Commission should take this opportunity to reiterate the TCPA's prohibition on the use of certain telemarketing tactics to contact wireless phones regardless of how difficult it may be for a telemarketer due to LNP or for other reasons to distinguish between a wireless and wireline phone. The technology exists today or will exist so that telemarketers will be able to identify wireless phones.

Respectfully submitted,

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